

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

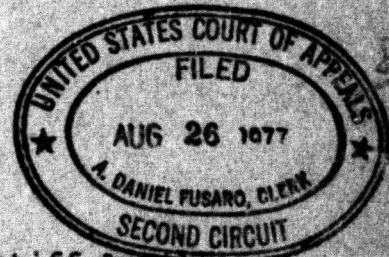
77-6087

To be argued by
M. DOUGLAS HAYWOODE

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff-Appellee,

-against-

PHILIP A, as Commissioner of Social Services
of the State of New York, ROBERT P. WHALEN, as
Commissioner of Health of the State of New York,
JOSEPH A. CALIFANO, Secretary of the U. S.
Department of Health, Education and Welfare,
ABRAHAM D. BEAME, as Mayor of the City of
New York, HARRISON J. GOLDIN, Comptroller of
the City of New York, and DONALD KUMMERFELD,
as Director of the Budget of the City of New York
and as pro tem Administrator of the Health and
Hospitals Corporation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE,
ARTHUR C. LOGAN MEMORIAL HOSPITAL

M. DOUGLAS HAYWOODE
Attorney for Plaintiff-Appellee
500 Fifth Avenue
New York, New York 10036
(212) 354-6363

(6551)

TABLE OF CONTENTS

	<u>Page</u>
Statement -----	1
Issue-----	6
Proceedings before the District Court-----	4
Argument-----	7
Conclusion-----	15

Addendum:

1. Memorandum and Order-----	16
2. Notice of Motion and Supporting Affidavits-----	40

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff-Appellee,

-against-

PHILIP L. TOIA, as Commissioner of Social Services
of the State of New York, ROBERT P. WHALEN, as
Commissioner of Health of the State of New York,
JOSEPH A. CALIFANO, Secretary of the U. S.
Department of Health, Education and Welfare,
ABRAHAM D. BEAME, as Mayor of the City of
New York, HARRISON J. GOLDIN, Comptroller
of the City of New York, and DONALD KUMMERFELD,
as Director of the Budget of the City of New York,
and as pro tem Administrator of the Health and
Hospitals Corporation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT

BRIEF OF PLAINTIFF-APPELLEE,
ARTHUR C. LOGAN MEMORIAL HOSPITAL

Statement

Arthur C. Logan Memorial Hospital, a private voluntary
institution, sued in the United States Southern District Court of New York
the Department of Health, Education and Welfare, officials of New York
State, its Department of Health, and the Mayor, Comptroller and
Budget Director and pro tem Administrator of the Health and Hospitals

Corporation of the City of New York, seeking, inter alia, a preliminary injunction enjoining the defendants from continuing arbitrary denial of medicaid reimbursement in accordance with the rates previously set by said defendants, and from arbitrarily failing to reimburse actual costs of said medicaid services in accordance with the said Medicaid Act; it asked that these defendants be enjoined from failing to comply with all federal rules and regulations of the United States Department of Health, Education and Welfare applicable to the medicaid program, so long as they participate in said program; that Health, Education and Welfare Secretary Joseph A. Califano be enjoined from ratifying or affirming the arbitrary acts of the defendants, and ordered to exercise his authority to compel the defendants City and State of New York to comply with the medicaid acts and regulations. The suit further prays that the City of New York be ordered to pay over forthwith all sums presently held without just cause pursuant to services rendered under the Medicaid Act and that the City and State be permanently enjoined from functioning under said act in such a way as to favor its own municipal hospital system to the detriment of plaintiff and other private institutions. The suit further alleges the State of New York has confiscated its services without just compensation by requiring plaintiff hospital to provide medical services to certain indigent members of the population without payment, pursuant to Chapter 712 of the Laws of 1973 in violation of the Fifth Amendment of the United States Constitution and further asks the

appointment by the Court of a federal master, monitor or referee to supervise and oversee the implementation of the State Plan enacted by the City and State of New York in compliance with the Medicaid Act for a period of one year or more to insure compliance with the said law pending this action to prevent irreparable injury, on the grounds that defendants are engaged in a far-ranging conspiracy to compel the plaintiff hospital to liquidate in the Bankruptcy Court, where it is presently in reorganization pursuant to Chapter 11, and to bring about said hospital's closure by multi-dimensional acts resulting in constricture of the flow of cash receivables owed the hospital under medicaid and other acts.

After service of a summons and complaint plaintiff obtained a temporary restraining order March 24, 1977 enjoining the defendant City of New York from unilaterally cancelling a so-called ambulance feeder contract, which supplies approximately 32% of the hospital's patient population. All papers were served on the defendants March 24, 1977, but at the specific request of the Corporation Counsel, representing the defendant City of New York, adjournments were made from the return date of March 31, 1977 to April 14, 1977. On the 14th of April, the Corporation Counsel requested further adjournment to April 21st for the purpose of making a response.

A preliminary injunction was entered by the District Court on that date and an order subsequently entered on May 23, 1977 from which the defendant City of New York now appeals, alleging plaintiff

failed to establish a valid federal claim.

PROCEEDINGS BEFORE THE DISTRICT COURT

Plaintiff Arthur C. Logan Memorial Hospital averred in its application for preliminary injunction that the City of New York, acting through its Health and Hospitals Corporation in furtherance of a conspiracy to eliminate five thousand hospital beds within the boroughs of said city pursuant to intentions stated by the defendant Governor of the State of New York in his State of the State Address, had embarked upon an effort to restrict the patient flow to said hospital by eliminating its ambulance feeder contract from which 32% of its patient population is obtained. It is recognized in the profession that hospitals operating at less than 82 to 85% of capacity are economically unviable. The plaintiff's affidavits were accompanied by exhibits from articles in the New York Times (p. 26a and 27a of the Record herein) confirming that officials of the Health and Hospitals Corporation had acted with this intention. The significance of this attempt is fully set forth at p. 18 of the transcript of proceedings on April 14, 1977. On the occasion of that hearing, the Corporation Counsel representing the City of New York presented no evidence whatsoever in contravention of the assertions in the plaintiff's application for a restraining order, but simply argued the Health and Hospitals Corporation was operating within its rights and the police powers relegated by the Constitution to it (circa p. 36). When the District Court (Owen, J.) requested the Corporation Counsel

to address himself to the issues pertinent to the temporary restraining order (p. 49), the Corporation Counsel requested a further adjournment of one week to obtain these facts (p. 57). On April 21, 1977 the Corporation Counsel submitted what purported to be minutes of the Board of Directors of the Health and Hospitals Corporation's proceedings pertaining to its resolution to cancel the ambulance contract together with an affidavit of the General Counsel of the Health and Hospitals Corporation asserting in general terms that he had talked with undisclosed members of said board and been assured they did not act in the manner characterized by the plaintiff and reported by the New York Times (p. 70). The resolution presented carried a date earlier than the alleged meeting of the Health and Hospitals Board (pp. 70-71) and the balance of the minutes supplied by the Corporation Counsel sustained through the statements of the Health and Hospitals Corporation's former director, Dr. John Holliman, the contention of the plaintiff and the reports provided by the New York Times. In no way has the Corporation Counsel controverted the allegations in the application for temporary restraining order (pp. 72-73). Though the City now complains no evidentiary hearing was held before the District Court it had every opportunity to produce evidence and take testimony and through its own choice, or dereliction, refused to do so (p. 79) though it had 24 days from the time the application was served upon it to fashion a response.

The District Court proceeded to find the burden of proof for

granting of a preliminary injunction had been made by the plaintiff Arthur C. Logan Memorial Hospital in that there had been a showing of jurisdiction; probability of success on the merits of the case; a balancing of equities and hardships tipping in the plaintiff's favor; a likelihood that irreparable injury would occur if the Court failed to act; and serious questions to make a fair ground for litigation (circa p.80. See also the Memorandum and Order of Owen, J. dated May 2, 1977, p. 85a of the Record.). The District Court specifically referred in its Decision and Order to the fact its ruling was compelled by the City's "...posture..." in this case (p.80). The Court declined to act on the Corporation Counsel's request that the complaint be dismissed on its own motion and set May 12, 1977 as a date when these issues would be argued after plaintiff's counsel had had an opportunity to respond. (Transcript of proceedings, pp. 86-101).

ISSUE

Does the plaintiff's complaint establish federal jurisdiction in the instant action..

* Counsel has requested the entire transcript be made part of the Record for the purpose of the Circuit Court's review and is at a loss to comprehend why those pleadings and records concerning the issue being appealed before this Court were not deemed relevant to be presented before it. See 2a of the Record entries of May 11 through May 23.

ARGUMENT

Plaintiff's complaint sets forth a valid claim upon which the District Court could exercise jurisdiction and grant relief. Succinctly speaking, plaintiff Arthur C. Logan Memorial Hospital's complaint alleges the City and State of New York acting alone and in concert fails to reimburse the plaintiff proper medicaid monies either under the terms of the medicaid act itself, 42 U. S. C. 1396, et seq., or in accordance with their own formula created by the State of New York under the so-called "State Plan" (paragraph 4 of the complaint). Any decision of this issue requires at a threshold level the direct application and interpretation of Sec. 1396a of the Medicaid Act setting forth the constraints and parameters the State Plan may contain and the requirement at 42 U. S. C. Sec. 1396a(2) that the State (here the City acts as its agent and paymaster), provide "...for carrying out the State Plan, on an equalization or other basis which will assure that the lack of adequate funds from local sources will not result in lowering the amount, scope, duration, or quality of care and services available under the plan;..."

Plaintiff contends the arbitrary recoupments as paymaster-agent for the State under the Medicaid Act so interfere with and confound its cash flow projection as to seriously endanger the quality of health care to be provided and the hospital's very sustenance and continuation. This fact alone meets the requirements of the jurisdictional tests set forth

in McFadden Express, Inc. v. Adley Corporation, 240 F. Supp. 791 (D.C. Conn., 1965) and Sonesta International Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973). As the defendant City of New York has raised no question save the jurisdictional requirement for the granting of temporary restraining orders, this brief presumes the City concedes the requirements as to serious questions going to the merits to make a fair ground for litigation, balancing of equities tipping toward the plaintiff, showing of possible irreparable injury. The Corporation Counsel's brief takes a micro-analytic view of the plaintiff's suit confining it to the issue of cancellation of an ambulance contract. Any fair reading of the complaint suggests its scope and purpose is of a more cathedral nature. The Corporation Counsel is functionally engaged on this appeal in a re-argument of the issue urged in the District Court before Judge Owen on May 12, 1977 in its motion pursuant to Rule 12(b)(6) of the Rules of Federal Procedure to dismiss plaintiff's cause of action. For the purpose of such a finding it is well settled that in considering dismissal motions the allegations of a complaint are to be taken as true. U. S. v. Mississippi, 1965, 380 U.S. 128. 3 L Ed. 2d 717, 85 Sup. Ct. 808. Every factual difference to be construed must be resolved in plaintiff's favor. McKinney v. DeBord, 507 F. 2d 501. Plaintiff's complaint must be construed most liberally. Davis H. Elliot Co. v. Carribean Utilities Co., 513 F. 2d 1176. Thompson v.

Montemuro, 383 F. Supp. 1200. And the question asked whether plaintiff's allegations construed in their most favorable light can reasonably be said to warrant relief under any theory of law. Scoma v. Chicago Board of Education, 391 F. Supp. 452. Madison v. Sielaff, 393 F. Supp. 788; Remington v. Remington, 393 F. Supp. 898. It has been further held a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt plaintiff could prove no set of facts in support of his claim it would entitle him to relief. First Delaware Valley Citizens Television, Inc. v. CBS, Inc. 398 F. Supp. 925. Corporation Counsel complains that a summary proceeding was instituted in the Bankruptcy Court, where the defendant City again objected to jurisdiction, for a portion of the relief demanded in the instant complaint (This action has been transferred by Bankruptcy Judge Lewittes before Judge Owen in the District Court and is presently pending with the suit.), but it has been held pendency of another action is not a matter that can be raised by a motion to dismiss. Sproul v. Gambone, 34 F. Supp. 441 (DCPA '40).

Plaintiff contends the defendants City and State of New York acting as principal and agent in para delictu unlawfully impair plaintiff's rights under contract in violation of Article I, Sec. 10 of the United States Constitution; contravene the supremacy clause of Article VI thereof by frustrating the clear decision and intent of the Medicaid Act; confiscate plaintiff's services for public use without just compensation

and otherwise deny adequate payments in violation of the Fifth Amendment of the United States Constitution interacting with the Fourteenth Amendment; and violate the civil rights, privileges and immunities of the trustees of the plaintiff Arthur C. Logan Memorial Hospital and deny the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution (paragraphs 4 and 6 of the Complaint). The Complaint further alleges other monies (paragraphs 8, 35, 36, 37, 38) are being withheld by the defendant City of New York in furtherance of an overall design to bankrupt the plaintiff hospital, and effect its dissolution in furtherance of the predetermined design to close five thousand hospital beds within the City.

In the proceeding below, the District Court expressly made reference to the case of Park East Hospital v. Califano, Toia and Whalen which is addended to this brief for the Court's edification as Appelle's Addendum No. 1 (p. 101 of the transcript of the proceedings of May 12, 1977). There the Park East Hospital similarly sued the State of New York and the Department of Health, Education and Welfare, alleging a conspiracy to force that hospital's closing in furtherance of the arbitrarily arrived at plan to eliminate five thousand hospital beds in the City of New York. The Court held in that case and the finding is controlling in the present suit, that federal jurisdiction existed insofar as the National Health Act requires the state to make recommendations to the state health planning and development agency and

otherwise comply with provisions of said act, 42 U.S.C. Sec. 300, before closing a hospital. Jurisdiction was founded on the grounds the federal government had pre-empted exclusively by this legislation the area of hospital closings, though it particularly distinguished those cases where the state acted in the interests of public safety under its police power.

Appellant's arguments in the brief supporting the appeal seem inapposite to the issue to be determined by the Circuit Court. The complaint does not contest the defendant City's right to maintain municipal hospitals in competition with plaintiff. It asserts, instead, said City and State, acting as sovereigns may not by devious means and a multiplicity of acts force plaintiff to abandon operations which it has maintained for over 115 years. Plaintiff has further contended in additional papers in the Record below in support of a motion for summary judgment addended hereto as Appelle's Addendum No. 2 for the Court's information, that it was entitled to due process hearing before the 2.1 million dollars recouped by the City of New York could be pulled from its cash receivables in the space of less than one year.

42 U.S.C. Sec. 1395(a), the so-called free-choice provision of the Medicaid Act states:

"Any individual entitled to insurance benefits under this title may obtain health services from any institution, agency, or person qualified to participate under this title if such institution, agency, or person undertakes to provide him such services."

As have many voluntary hospitals under the present inflation, Arthur

C. Logan Memorial Hospital runs an annual deficit of 1.4 million dollars which has directly occasioned its fiscal difficulties. Its location in an economically disadvantaged sector of the city deprives it of the gifts and endowments available to larger voluntary hospitals in more affluent areas and creates a situation in which more than half of its patient population is covered by Medicaid. This is most unique even within the City of New York where comparable rates of medicaid patients in other voluntary hospitals average 25 to 35% less. Arthur C. Logan Memorial Hospital maintains the largest ambulance district in the city and serves a demographically highly concentrated target population. If Logan Hospital were closed it would be incumbent upon residents of the West Harlem Community which it serves to travel great distances for the quality of care which is only available in a voluntary as opposed to a municipal hospital in the perception of said residents. The Logan rate of occupancy, approximately 96%, juxtaposed with that of the neighboring municipal hospital, Sydenham, stated at 68% (though they have recently closed over 30% of their total beds, which would make a true percentile meaning drastically lower) indicates the residents have exercised the free choice which the Congress intended be available when it passed Sec. 1395(a) of the Medicaid Act. Plaintiff's suit additionally implies its forced closure would obviate and otherwise preclude West Harlem residents and other Medicaid patients from exercising that free choice contemplated by Congress.

Paragraph 19 of plaintiff's complaint alleges jurisdiction under interpretation of Medicaid statutes and "principles of pendent" or ancillary jurisdiction. Assuming the narrow-gauged, procrustean view the defendant City seeks to take of this action, arguing the act of cancelling the ambulance feeder agreement is not a matter which in and of itself violates federal law, the District Court could properly, in its discretion assume jurisdiction over a nonjurisdictional act where the jurisdictional or federal claim has sufficient substance to compel jurisdiction of the subject matter on the Court and the relationship between the claims are so intertwined as to present one case. 32 Am. Jur. 2d, Federal Practice and Procedure Secs. 45 and 46. Here, jurisdictional economy, convenience and fairness to the litigants sufficiently appear to justify the Court's discretionary exercise of jurisdiction.

United Mine Workers v. Gibbs (1966) 383 U.S. 715, 16 L Ed 2d 218, 86 S. Ct. 1130. In Revere Copper and Brass, Inc. v. Aetna Casualty and Surety Co., (1970, CA5 Ala) 426 F2d 709, 12 ALR Fed. 389 the Court exercised ancillary jurisdiction as to matters it considered arose out of or were closely related to facts which were determinative of the plaintiff's action where it otherwise had jurisdiction. Acts incidental to the exercise of primary jurisdiction of the Court, such as writs and orders necessary for the performance of its duties require no separate allegation or proof of jurisdictional acts. 32 Am. Jur. 2d, Federal Practice and Procedure Sec. 14.

Corporation Counsel relies upon the decision of Broderick, J. in Sasse v. Ottley, 77 Civ. 1570 (Addendum D of Appellant's brief), but a temporary restraining order was in fact granted in that case and, as pointed out by the United States Attorney in the argument below (p. 101 of the transcript of May 12, 1977) jurisdiction was not denied, but simply a preliminary injunction. There, as in the instant case, the issue before the Court concerned acts undertaken with regard to Medicaid funds. There a creditor sought to attach them in the hands of the city as paymaster-agent for the state. Here, the City, looking to be judge in its own case (p.33 of the transcript of April 14, 1977), having filed no proof of claim in the Bankruptcy Court, and in fact, refusing to submit to its jurisdiction, now questions the jurisdiction of the District Court and simply acts to seize upon and asport with Medicaid funds due the Logan Hospital. It is difficult to conceive how jurisdiction could exist in that case, if not this one.

The instant action sets forth many jurisdictional allegations in which the right of the plaintiff will be sustained or defeated by construction or interpretation of the Constitution, and/or laws of the United States and is clearly a case which arises under the Constitution and said laws as originally identified by Chief Justice Marshall in the classic, grundnormic decision of Osborne v. Bank of the United States, 9 Wheat. 738, 822, 6 L Ed 204 (1824). Plaintiff's complaint is controlling, counterclaims and anticipated defenses being beyond the pale and purview of the

law's analysis where jurisdiction is questioned, and under the practice of modernity and contemporaneity it is difficult to conclude a suit seeking mandamus against a federal official pursuant to 28 U. S. C. 1361 for declaratory judgment of rights under 28 U. S. C. 2201-2, existing under 42 U. S. C. 1395, et. seq., and the Medicaid Act in general could fail to exert a federal claim.

CONCLUSION

The order of the District Court granting the preliminary injunction should be affirmed and the appeal dismissed forthwith with costs.

August 26, 1977

Respectfully submitted,

M. DOUGLAS HAYWOODE
Attorney for Plaintiff-Appellee

1715321

ADDENDUM NO. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
:
PARK EAST CORPORATION d/b/a
PARK EAST HOSPITAL, : 77 Civ. 1241

Plaintiff, :

-against- : MEMORANDUM AND ORDER

JOSEPH CALIFANO, Secretary of :
United States Department of :
Health, Education and Welfare, :
PHILLIP L. TOIA, Commissioner of :
the Department of Social Services :
of the State of New York, :
ROBERT P. WHALEN, Commissioner :
of the New York State Department :
of Health, and JACQUELINE G. :
WILSON, Region II Director of :
the United States Department :
of Health, Education and Welfare, :
:
Defendants.
-----x

OWEN, District Judge

This is a motion for a preliminary injunction by Park East Hospital to restrain certain New York State officials from in effect ending its existence by acts alleged to be malicious, discriminatory and unlawful.

Park East Hospital, at 112 East 83rd Street, New York, New York, is a small proprietary hospital of 106 beds built in the 1930's. In 1973 there was a transfer of ownership to seven physicians connected with the

hospital. Subsequently, four of the doctors dropped out of the partnership, leaving as the present owners Doctors Shaw, Diamond and Thomas.⁽¹⁾ The hospital has also been the subject of ongoing hearings before a State Hearing Officer, Earle Zaidens, regarding alleged violations of the State Hospital Code and Life Safety Code.

In October 1976, the hospital was informed that it was being considered for termination of its participation in the Department of Health, Education and Welfare (HEW) Medicare/Medicaid program. A meeting was held between the hospital and HEW on October 28, 1976, a plan of correction was later submitted and inspection visits

(1)

The Park East Corporation is the actual owner of the hospital, and is presently the debtor-in-possession under Chapter XI of the Bankruptcy Act. Doctors Shaw, Diamond and Thomas are the sole stockholders of the Park East Corporation. The hospital ran into difficulties with the State Public Health Council and the Commissioner of Health regarding approval of the transfer of ownership, and in 1975 the hospital's operating certificate was revoked on this ground. In an Article 78 proceeding, the operating certificate was restored by the court. For a history of these events, see Park East Corp. v. Whelan, 47 A.D. 2d 296, 366 N.Y.S.2d 432 (1st Dept. 1975).

to the hospital were made.⁽²⁾ Finally, on March 2, 1977, the hospital was informed that its participation as a provider of services was to be terminated as of April 1, 1977 and that notice of that termination would be published on March 17 in the New York Times. Because the alleged deficiencies, relating to the Life Safety Code and to the Pharmacy Conditions of Participation, were considered by HEW to create "a serious life threatening situation,"⁽³⁾ it was asserted that any hearing protesting HEW's decision would have to be conducted after the termination of the hospital.

On March 15, 1977, Park East filed its original complaint herein together with an order to show cause

(2)

The State's subsequent refusal to approve allegedly-needed corrective plans is dealt with hereafter, as is a curious juxtaposition of a highly negative pharmacy inspection by an HEW employee followed shortly by a routine State inspection showing the pharmacy to be in compliance.

(3)

The letter stated:

"We are aware that your facility requires the permission of the New York State Department of Health before the significant physical plant corrections can be made. This office recently contacted the Department of Health and we were informed that your facility had not yet submitted an acceptable request for permission to correct the significant physical plant deficiencies. If an application is finally submitted, undoubtedly a considerable amount of time will elapse before a final decision is reached. In the interim, a serious life threatening situation continues to be in existence which can no longer be tolerated for an indefinite length of time." (Underscoring supplied)

seeking to enjoin HEW, as well as various state officials who administer Medicare/Medicaid money, from terminating the hospital participation in the Medicare and Medicaid programs prior to a hearing. On that date, I signed a temporary restraining order⁽⁴⁾ with attorneys for all parties present, and set a hearing for March 17 on whether the hearing should be pre or post-termination.

On the morning of March 17, I personally toured

(4)

The order reads as follows:

"ORDERED, that pending the hearing and determination of this application, the defendants, their attorneys, officers, agents, servants, employees and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be restrained and otherwise enjoined from (a) terminating the participation of PARK EAST HOSPITAL in the Medicaid and Medicare Programs; (b) removing Medicaid and/or Medicare patients from the PARK EAST HOSPITAL; (c) discontinuing reimbursement to the said facility for care rendered to Medicare and Medicaid patients, and (d) taking any and all further steps or actions relating to the termination or participation of PARK EAST HOSPITAL in connection with the said Medicare and Medicaid programs, including but not limited to, serving notice by publication in the New York Times in connection with said termination of PARK EAST HOSPITAL in said programs"

the Park East Hospital with attorneys for all parties as well as various experts, (5) who pointed out or disputed certain alleged violations. The hearings were continued in the courtroom that afternoon, as well as on March 18, 21 and 24, with considerable testimony being taken.

On April 4, 1977, Park East served an amended verified complaint adding Blue Cross/Blue Shield as a party (6) and a fourth cause of action. (7)

During the pendency of the case before me, Park East

(5)

Present for Park East were: J. Russell Clark, the hospital's administrator; Allan A. Sylvane, a licensed professional engineer; Irving P. Marks, the hospital's consulting architect; Charles F. Boswick, the hospital's consultant in fire safety and disaster planning; and Dr. James Thomas, one of the hospital's operators.

Present for HEW were: Milton Webber, Program Officer for HEW, Richard Pike, an architect who inspected Park East; Emilio Pucillo, an architect and Mr. Pike's supervisor at HEW, and Louis Beshara, a pharmacist who inspected Park East.

Present for New York State were: Joseph Marino, an architect for the New York State Department of Health for the City of New York; and Albert Lyons, an engineer for the Department of Health.

(6)

Since Blue Cross/Blue Shield was not a party to the hearing, they are not affected by the determination of this motion.

(7)

A further order issued against the State after oral argument, based on this fourth cause of action, staying all proceedings by the State against the hospital, which had sought to enforce an order by Commissioner of Health Whelan closing the hospital, and was signed the day after I signed the original TRO.

and HEW entered into settlement negotiations and a stipulation of settlement was signed on April 4, 1977, giving Park East 60 days in which to make certain corrections. Therefore, the only controversy remaining before me is between Park East and the various State defendants.

In the original complaint, jurisdiction over the State defendants was based on a claim of pendant jurisdiction. The State has moved to dismiss this complaint for lack of subject matter jurisdiction. However, I need not reach that question, for the fourth cause of action in the amended complaint⁽⁸⁾ alleges facts which clearly give

(8)

AS AND FOR A FOURTH CAUSE OF ACTION

"27. The jurisdiction of this Court as to this Cause of Action arises under Title 42, United States Code, Subchapter XIII, § 300k, et seq. (National Health Planning and Resources Development Act of 1974, hereafter the "National Health Planning Act"), and under 28 U.S.C. 1331(a) in that the matter in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs, and arises under the Constitution and laws of the United States.

"28. The National Health Planning and Development Act preempts the jurisdiction of the State of New York in areas covered by said legislation by virtue of the Supremacy Clause of the Constitution of the United States by reason of Congressional findings set forth in 42 U.S.C. § 300k, and the establishment of National Guidelines for Health Planning pursuant to 42 U.S.C. §300-k-1.

"29. Pursuant to the said National Health Planning Act, the State of New York was required to establish a "State Health Systems Agency" pursuant to 42 U.S.C. § 300 1-2, for the purposes therein set forth.

"30. That pursuant to 42 U.S.C. § 300 m-2 the State Health Systems Agency was responsible in New York to conduct

(continued)

(8) (continued)

the health planning activities.

"31. That in violation of the aforementioned provisions of Title 42, U.S.C., the State defendants knowingly and willfully violated same by establishing a "strategy", which did not meet the legal requirements of a State Plan providing for the elimination of plaintiff's hospital within New York, without said "strategy" being initiated, conducted or approved by the State Health Systems Agency.

"32. The actions of the State defendants in attempting to close plaintiff's hospital is motivated by actual malice, prejudice and bias.

"33. The actions of the State defendants in attempting to close plaintiff's hospital is discriminatory, without lawful justification.

"34. The State defendants, in furtherance of their illegal actions aforesaid, have pre-determined to effectuate the closing of plaintiff's hospital, and as a means to implement same have denied, and continue to deny plaintiff's procedural and substantive due process, both as to federal law and New York law, in denying plaintiff permission to make repairs and alterations to the hospital and have conspired with the defendant Blue Cross and Blue Shield of Greater New York, to the end that plaintiff's hospital will be closed, and in furtherance thereof, said Blue Cross has illegally terminated plaintiff's participation in the Blue Cross/Blue Shield Program.

"35. The State defendants have conspired together and with the defendant Blue Cross and Blue Shield of Greater New York to violate the foregoing provisions of Title 42 of the United States Code in order to deny plaintiff of its assets, property, rights, privileges and immunities, as same are secured to plaintiff under the Constitution of the United States and the Amendments thereto."

this court "federal question" jurisdiction over the State defendants. (9)

The fourth cause of action is based on the National Health Planning and Development Act, 42 U.S.C. §§ 300k et seq. (the Act) which was enacted to provide for comprehensive health planning. (10)

The Act calls for the setting up of local Health System Agencies (HSA),⁽¹¹⁾ with mandated requirements for its legal structure, staff size, composition and the public nature of its meetings, § 300l-1(b). The primary function of an HSA is health planning, including "preventing unnecessary duplication of health resources" § 300l-2(a)(4). The HSA is to develop a Health Systems Plan (HSP) including

(9)

By motion dated April 15, 1977, the State seeks to dismiss this fourth cause of action as well. For the reasons set forth in this opinion, that motion is denied.

(10)

"[I]t is the purpose of this Act to facilitate the development of recommendations for a national health planning policy, to augment areawide and State planning for health services, manpower, and facilities, and to authorize financial assistance for the development of resources to further that policy." 42 U.S.C. § 300k(b).

(11)

New York City has such an HSA, which is funded by a \$1.15 million grant from HEW.

an Annual Implementation Plan (AIP), § 300~~l~~-2(b). The HSA is also to review at least every five years "all institutional health services offered in the health service area of the agency and . . . make recommendations to the State health planning and development agency designated under section 300m . . . respecting the appropriateness in the area of such services." § 300~~l~~-3(g)(1).

The Act also calls for creation of State Health Planning and Development Agencies and Statewide Health Coordinating Councils, §300m, which, inter alia, coordinates the HSPs and AIPs submitted by the various HSAs, and forms a State Health Plan. The Act finally calls for the general supervision of the entire system by the Secretary of HEW and for review of any health system changes proposed by the State,⁽¹²⁾ §300n.

Even this brief summary of the National Health Planning and Development Act makes it clear that Congress intended

(12)

"The Secretary of HEW is authorized to review any health plan in consultation with the appropriate Statewide Health Coordinating Council. Upon finding that the plan is not consistent with the purposes of the proposed legislation, including implementation of the national health planning guidelines, the Secretary shall require modification of the plan to such purposes." Legislative history, 1975 U.S. Code & Cong. & Ad. News at 8948.

federal preemption in the field of health planning. There is no claim that this Act in any way affects a state's inherent police power to regulate hospitals and insure their compliance with various state health and hospital codes. However, the complaint alleges that the State defendants' acts in attempting to close Park East are motivated by a desire to eliminate excess hospital beds in New York State in contravention of the Act.⁽¹³⁾ This states a cause of action cognizable in a federal district court. While the Act does not expressly provide a remedy to a party aggrieved by reason of non-compliance, a federal remedy must be implied, given Congress' clear intent to have all health planning implemented pursuant to the Act. "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."

J.I. Case Co.v. Borak, 377 U.S. 426, 433 (1964).

(13)

In order for the State to close Park East as an excess facility in accordance with the Act, the HSA, after study and public hearing, would have to make its recommendations to the State Health Planning and Development Agency. Park East could again demand public hearings before the State agency. §300n-1(b)(8).

"If a State health planning and development agency acts to modify or discontinue any existing health facility, institutional health service, or health maintenance organization, the local health planning agency is directed to assist the affected entity in improving or eliminating such service." Legislative history, 1975 U.S. Code & Congr. & Ad. News at 8950.

Having determined that there is jurisdiction here, the next question is whether a preliminary injunction is appropriate. The well-established standard for the issuance of a preliminary injunction is whether there has been "a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting/preliminary relief." Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973) (emphasis/ⁱⁿoriginal).

A showing of irreparable injury is clearly made, for it is obvious that Park East would cease to function following State enforcement of Commissioner Whelan's order of March 16, 1977. The State claims, however, that there is immediate danger to the life, health and safety of patients at the hospital if it is allowed to remain open. If such were shown, I would not consider an injunction. However, given the entire record, including my personal, guided inspection, the testimony of the State's own witness, George Early, and the State's routine pharmacy report of January 14, 1977, I do not find such an immediate danger exists.⁽¹⁴⁾ Therefore,

(14)

I note particularly that the Commission's order is premised upon "structural deficiencies" which was completely undercut by Mr. Early's testimony that the violations could be corrected and that waivers were appropriate as to certain of them (see n.17 infra). HEW is implicitly in accord with

the "balance of hardships [tip] decidedly toward" Park East.

As to the hospital's likelihood of success on the merits, I find the following facts after four days of hearings and the receipt of much documentary evidence.

The hospital's claim, in essence, is that the State, having determined to reduce hospital beds in New York City, rather than proceeding under the Act, has resorted to the assertion of claims of various violations in the structure of the building and the operation of the hospital to force its closure.

Park East contends that the alleged violations are either without sufficient merit to warrant closure of the hospital, and/or that the hospital has been deliberately prevented from remedying these violations by the State's refusal for one reason or another to act on the applications for permission to remedy. Park East, having been turned down by the State in its efforts to comply, charges that the State is now using the failure of compliance as a basis for closure.

(14) (continued)

this view, having stipulated to a sixty day period for corrective action. On this very subject, Mr. Milton Webber, Program Officer of the Bureau of Health Insurance of HEW for Region II testified that "If we thought we could have gotten a reasonable resolution in a reasonable amount of time we would not have terminated But if I can't see the end of the road I have to sorry about that" Under the hospital's stipulation with HEW, the hospital is presently proceeding with construction to remedy the Life Safety Code violations cited by HEW in its termination letter. This construction is to be completed by May 20, 1977.

It appears without question that there have been and are an excess of general care hospital beds in New York City, and that the reduction of this excess has for some time been a matter of official concern. The report of the Health and Hospital Planning Council of Southern New York, Inc., of February 4, 1976, specifically lists Park East as a hospital not needed and significantly comments that it had been "previously recommended for closure" Governor Hugh L. Carey, in his "State of the Health" message to the Legislature of February 17, 1977, further enunciated this concern, stating, "A strategy to effect^{the}/orderly closure of excess bed capacity in our general hospitals is to be developed within the next few months." (15)

It would appear that this "strategy" was already

(15)

Of significance is the following exchange between the Court and Mr. Early reflected in the record on the last day of the hearings:

[The Court]: . . . Mr. Early, the other night in the robing room, said at one point, when I was trying to see if we couldn't work this thing out, he said to me, "What does this do to Governor Carey's effort to reduce the number of beds?" I am troubled by that.

[The Witness]: I didn't say those words.

[The Court] : Well, in substance you said that to me... .

I note, however, that unlike the showing Park East has made as to the acts of other State officials, Gov. Carey proposed that the State act "consistent with the requirements of the National Health Planning and Resources Development Act"

being applied to Park East in 1974, for its operating certificate was revoked by the State Commissioner of Health, Robert P. Whelan, on the ground that the Public Health Council had not approved the transfer of ownership. From the opinion of the Appellate Division, 366 N.Y.S.2d at 433, it appears that the failure to "approve" the application was rather a failure to act upon it, for at the time of the proposed revocation of the Operating Certificate, the Council had the application for a transfer pending before it but had not acted. The foregoing caused the Appellate Division to unanimously observe as follows:

The punishment of revocation, however, which has been imposed is clearly unreal and harsh. The hospitals seem to be operating in exemplary fashion, the proposed transferees, who are in effective control, are physicians from the community, and the area served is benefited by the continued operation of the hospitals. No suspension or other interruption of services seems warranted, and any disruption can only be harmful to the ongoing services of the hospitals, their employees and patients, and those associated with them.

While the record is not clear as to why an application for transfer of ownership has not been ruled upon by this time, it would seem that in this matter a definitive determination by the Public Health Council should come prior to any sanction being imposed. The intervening petitioners have not operated by stealth. The documents and the related agreements and papers for the sale of the stock were filed with the Public Health Council, and there is no indicia of any untoward aspect. 366 N.Y.S.2d at 434.

Appropriate to consider at this point is the fact that of the 28 "unneeded facilities" to be closed listed in the February 4, 1976 report of the Health and Hospital Planning Council of Southern New York, Inc., Mr. Early inspected 19 of those, ⁽¹⁶⁾ including Park East, because they were on a "priority list." Conversely, and of statistical significance, is the fact that in over two years Mr. Early only inspected 29 hospitals (including the 19 on the "priority list"). He stated as to this in hearings before State Hearing Officer Zaidins:

"A. I might add the list I believe was probably determined by those hospitals where beds were deemed to be not needed purely on the basis of bed needs throughout the city.

"Q. That was the basis of your inspection?

"A. Yes."

Events appear to have moved with considerable speed in early 1976 and, in an apparent effort to cause the

(16)

I note that Sydenham, a Manhattan municipal hospital, was one of those listed as excess. I include it in the total of those Mr. Early inspected because although he did not inspect Sydenham, he did inspect its competitor that was not listed, Arthur C. Logan Memorial Hospital, a voluntary hospital which is also now before me in 77 Civ. 1216, alleging that it is the target of discriminatory closure efforts by the New York City Health and Hospitals Corporation, the purpose of which is to save Sydenham. I have granted a preliminary injunction in that case.

federal government to be the agency forcing Park East's closure, Dr. Frank T. Cicero, Second Deputy Commissioner of the New York State Department of Health, on May 14, 1976, sent by hand materials to the Social Security Administration, urging that the said materials were an appropriate basis for federal decertification, and stated, "I would like to impress upon you the urgency of taking effective and immediate action to prevent [Park East] from collecting further Federal/State monies."

In the course of the summer, hearings before the State hearing officer were begun on Park East, and continued in a desultory fashion over several months, there being statements made by State officials to Park East indicating that some of the structural deficiencies⁽¹⁷⁾

(17)

The nature of these deficiencies have been subject to unexpected change. The hearings before me were commenced on the premise that the federal government, based on both a state and federal inspection, charged, among other things, (1) non-complying fire doors in the two stairwells, and (2) an inadequate second fire egress which dipped part-way into the basement before rising to the street level exit door. The doors, it was claimed, required total replacement and the second egress required complete

(17) (continued)

rerouting and rebuilding. However, on the last day of the hearing before me, Mr. Early, the State inspector, testified for the first time that a waiver might have been granted as to the non-complying doors since they were - in fact are now - fire resistant,

[Mr. Early]: . . . I was willing to accept that the department would review a request for waiver on the stair doors upstairs through the building

and that the front stairway, rather than needing rerouting, was and is in fact remediable with the mere addition of a separation at the landing half-way between the first floor and the basement,

[The Court]: You already say you are prepared to accept the front stair that goes down and makes a dip into the basement and comes up.

[Mr. Early]: There would have to be created a separation between the portion that continues down from the intermediate landing and the portion that then goes out to the front.

[The Court]: I see. All right.

of Park East might well be waived.

When it became apparent in the fall of 1976 that waivers were not to be forthcoming, Park East, after having reasonably waited, prepared rough architects' plans to comply with the State's demands and the proposals for alterations were submitted to the State on November 18 and 19, 1976. These proposals were rejected by the State in a letter dated December 2, 1976, in which the basic explanation was that "we cannot accept corrections piecemeal" (18)

On December 20, 1976, Park East received a letter from Deputy Commission Glenn Haughie stating that an application for a sidewalk lift from the basement, which had been made two years earlier, was disapproved "on the basis of need." However, given the State's attitude toward Park East expressed in the Cicero letter of May 4, 1976, this revealing, too-flat rejection on March 4, 1977, was quickly replaced by a less flat rejection, in which

(18)

Given Deputy Commissioner Cicero's peremptory letter to federal authorities the prior May (see p.16 supra), this is arguably a spurious subterfuge. On the hearing before me, the State shifted its emphasis for rejection to the fact that the ownership of the hospital was not spelled out in the papers. I reject this explanation based on an assessment of the entire record, the opinion of the Appellate Division and an awareness that the cost of the alterations was relatively small.

Deputy Commissioner Haughie wrote to Park East and explained that this disapproval was in error since hearings were in progress, and the application would be carried as a pending application to be ruled on at the close of the hearings. (19)

There are other deficiencies alleged by the State. (20)
Turning to the pharmacy department, during the fall

(19)

Why should the State, one queries, feel it has the power to decline to act on ordinary requests in the normal course merely because hearings are going on? This obviously gives it the power to frustrate compliance efforts by this simplest of expedients.

(20)

Somewhat troublesome is some evidence introduced by the State that the operating room is not all that it should be. The State hearing officer, Professor Zaidins, based upon testimony furnished to him, came to a conclusion that the radiators in the operating and recovery rooms presented a health hazard. Testimony was also presented before me with regard to the window air conditioning not adequately filtering dust. It would appear that these conditions, acceptable in a hospital's operating room when this building was constructed 40 years ago, may no longer be acceptable. This is, however, certainly by itself, not a basis for closure of an institution, particularly given the willingness of the owners to invest capital and make other structural changes, such as those being made at this very moment. I assume appropriate and expeditious State approval for any necessary changes will be forthcoming.

of 1976, a federal investigator found non-compliance. Park East complained that the investigator who came was biased, and a reinvestigation was made by one Louis Beshara. Beshara wrote a report devastatingly critical⁽²¹⁾ of the hospital's pharmacy department as well as other aspects of the hospital, as to which Mr. Beshara appears to have little competence to judge. The weight and credence to be given Mr. Beshara's report is further a troublesome question for the Court, since it is the fact that within a number of weeks, in the regular course of routine inspections by the New York State Education Department Board of Pharmacy, an inspector went through the pharmacy and found it in compliance with State standards. It is of further significance to note that after the hospital put into evidence the subsequent routine examination of the pharmacy finding it to be in "compliance," the State made no effort whatsoever to call the inspector to "comment" upon or alter his findings.

Finally, I note that during the course of the

(21)

In some respects, he appears to have been unfairly critical, e.g., he frequently used the word "misbranded" as follows:

- Q. And then you have generic drugs with misbranded and mislabelled with trade names. Now that means that essentially they

hearings, on the evening of March 21st, during the third session of the hearings, Mr. Early answered the Court as follows:

Q. Reasonable comprehensive plans were in your hand. Is there any reason that could not receive appropriate consideration?

A. Yes.
Now there is since, the Commissioner's letter to close the facility.

Q. Well, I know, but the Commissioner's letter to close the facility is another matter and we can give that the appropriate consideration in the context, but assuming that --

A. I had previously testified in the hearing that the building was correctable.

At that point, I brought the parties into the robing room to see if there was a possibility of resolving the issues, having throughout this hearing expressed my view that I would regret the demise of an operating facility that was serving the community unless there were compelling reasons for it. I urged all parties to explore this.

(21) (continued)

have the same properties but they come from a different source; is that correct?

A. Yes.

Q. So "misbranding" there doesn't mean you get the wrong drug but it means you get it from a different source. You used here from time to time "it is misbranded" because it doesn't have a lot number; right?

A. Yes.

When we resumed the hearing three days later, I was presented with a letter from Assistant Commissioner Warren Toff, in which the efforts to resolve the issues were rejected on the basic theory that the structural deficiencies had not been corrected and the operational deficiencies had not been timely corrected. I must view this final rejection, indeed the entire attitude of the Department of Health, in the light of the contents of a memorandum of January 26, 1977 to Milton Webber from Morris London, Director of Division of Quality and Standards of HEW, in which he writes:

Attached is the report of a follow-up on the Plan of Correction and surveys conducted by Ms. Whitney, Mr. Beshara and Mr. Straub.

You will note that although considerable improvement has been shown by [Park East] in correcting deficiencies in the operational aspects, several key areas continue to remain out of compliance with the Medicare Conditions of Participation. Furthermore, these Conditions, Compliance with State and Local Laws and Life Safety Code deficiencies, will continue not met, unless the New York State Department of Health permits the facility to institute corrective action. (emphasis added)

Given all the foregoing, the plaintiff has demonstrated with considerable clarity a great probability of success

on the merits of its fourth cause of action, and particularly that a firm and unalterable determination⁽²²⁾ had been made by the Department of Health, perhaps as early as 1975, to close this hospital, thus denying Park East due process of law, particularly as now required by the National Health Planning and Development Act. Irreparable injury having been earlier found, the preliminary injunction sought by the plaintiff is granted.

On the entire record, I find it appropriate to note that I cannot and do not conclude that the management of Park East always acted with alacrity to correct problems that many hospitals, particularly older ones, have. That attitude, to the extent it existed before, appears to have changed.⁽²³⁾ However, even assuming this former attitude, that is not justification for the roadblocks which plaintiff's proof strongly suggests the State at some point determined to put in its way of achieving

(22)

On this record, Park East has placed also in serious question the State's openmindedness at the hearings being held before State Hearing Officer Zaidens.

(23)

This is evidenced by the investment in new construction that is currently and expeditiously under way to meet the stringent requirements of the stipulation between Park East and HEW.

compliance. Thus, it is to the State's conduct, and not the hospital's, that this opinion is addressed. Nothing in this opinion, however, is intended to be a statement that the State may not, in the exercise of its police power, protect the health needs of its citizens by requiring appropriate compliance with law. What is enjoined by this Court is any improperly motivated use of power by the withholding of approval of various changes to prevent remedy and thus reach a predetermined goal, to wit, the closure of a facility on the theory that it is excess.

The foregoing constitute my findings of fact and conclusions of law. Submit order on notice.

April 28, 1977.



United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff,

-against-

PHILIP L. TOIA, as Commissioner of Social
Services of the State of New York, ROBERT P.
WHALEN, as Commissioner of Health of the
State of New York, HUGH L. CAREY, as
Governor of the State of New York, JOSEPH A.
CALIFANO, Secretary of the U. S. Department of
Health, Education and Welfare, ABRAHAM D.
BEAUNE, as Mayor of the City of New York,
HARRISON J. GOLDIN, Comptroller of the
City of New York, and DONALD KUMMERFELD,
as Director of the Budget of the City of New York,
and as pro tem Administrator of the Health and
Hospitals Corporation,

Defendants.

NOTICE OF MOTION

77 Civ. 1216 (RO)

S I R S :

PLEASE TAKE NOTICE that upon the 18th day of August, 1977 at 2:15
O'Clock, or as soon thereafter as counsel can be heard at Room 1902 in the
United States Courthouse, Foley Square, New York, New York, the plaintiff, by its
attorney, will move this court pursuant to Rule 56(a) of the Federal Rules of Civil
Procedure for an order directing entry of summary judgment in favor of plaintiff
against the defendants on certain causes of action and for relief sought in plaintiff's
complaint. This motion is made on the ground that no genuine triable issue of
material fact exists, and that plaintiff is entitled to judgment as a matter of law.

This motion is based on the affidavit of plaintiff attached hereto as
Exhibit "A" and on the files and pleadings in this proceeding.

Dated: New York, N.Y.
August 17, 1977.

M. Douglas Haywoode,
Attorney for Plaintiff

M. DOUGLAS HAYWOODE
500 Fifth Avenue
New York, New York 10036
(212) 354-6363

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff,

-against-

PHILIP L. TOIA, as Commissioner of Social
Services of the State of New York, ROBERT P. WHALEN,
as Commissioner of Health of the State of New York,
HUGH L. CAREY, as Governor of the State of New York,
JOSEPH A. CALIFANO, Secretary of the U.S. Department
of Health, Education and Welfare, ABRAHAM D. BEAVER,
as Mayor of the City of New York, HARRISON J. GOLDIN,
Comptroller of the City of New York, and DONALD
KUMMERFELD, as Director of the Budget of the City
of New York, and as pro tem Administrator of the Health
and Hospitals Corporation,

Defendants.

: AFFIDAVIT

: 77 Civ. 1216 (RO)

STATE OF NEW YORK

:ss:
COUNTY OF NEW YORK)

WILLIAM O. ALLEN, being duly sworn, deposes and says:

1. That he is the Executive Director of the plaintiff ARTHUR C. LOGAN
MEMORIAL HOSPITAL in the above entitled action and makes this affidavit in
support of plaintiff's instant motion for summary judgment, as to each of the
designated causes of action as set forth below. Plaintiff Arthur C. Logan Memorial
Hospital has alleged by way of its complaint that the defendant City of New York,
since January of 1975 and for extensive periods has engaged in a series of recoupments
which said defendant alleges are owed to it by the hospital. Defendant City of
New York's answer to the complaint herein now alleges that the deductions from
plaintiff's Medicaid payments were for the purpose of "recouping" advances in the
amount of \$8,934,763.89 which it claims had been overadvanced by the Division of
Charitable Institutions to the hospital.

2. During the course of the hospital's desperate plight through 1974 and 1975, deponent with other representatives of the hospital met with various city officials including defendant Abraham Beame, then Comptroller of the City of New York, Deputy Mayor James Cavanaugh, and other representatives of the Bureau of the Budget and with representatives of the State Commissioner of Health for the purpose of setting forth the inadequacy of the rate of reimbursement provided the Arthur C. Logan Memorial Hospital by the system and formula through which said reimbursements were then being determined.

3. In the face of these protestations and pursuant to the supplications of the Arthur C. Logan Memorial Hospital, said city officials stated that they would begin to make payments sufficient to cover the actual costs and expenses of the hospital in view of the population it serviced, primarily indigent persons residing within the Central and West Harlem areas of the City of New York (a population which makes it unique among voluntary hospitals and places Logan in a position of providing services to a target population usually found in municipal hospitals). This decision by said city officials to pay the actual costs as they arose of the plaintiff hospital was made at a time when the policies of said defendant City of New York were such as to recognize the sacrifices and contributions being made in behalf of its citizens, for whom it had a responsibility, together with the State of New York, a situation which has dramatically and disasterously reversed itself.

4. Article 8, Section 1 of the State Constitution explicitly and expressly forbids the making of any loan to any entity by the State of New York or its subdivisions, encompassing also the City of New York, both defendants herein. At the time of the making of these payments none of the city officials required representatives of the Arthur C. Logan Memorial Hospital or this deponent to execute any document or to otherwise acknowledge the fact that said payments were anything other than compensation for services rendered. The payments made were decided upon after

a prolonged and protracted series of meetings which spanned many months. These payments were also made in the face of claims by the hospital that its reimbursement rate under the Medicaid law was wholly inadequate and in response to the hospital's display of the projected deficit of approximately 1.4 million dollars it was accumulating each year, together with other voluntary hospitals in the city.

Arthur C. Logan's problem was more greatly exacerbated, however, due to the unusually high percentage of poverty oriented clientele serviced. Logan Hospital's position in this respect as set forth above is indeed unique.

5. At no time during the course of these negotiations and supplications did any official of the City of New York or of the State of New York suggest it was in the process of making loans of money to the hospital which it would, at some future time, seek to recoup by "lump-sum" seizures of federal, state and city funds owed to the hospital in the future under the Medicaid and other programs. There is no writing to this effect to deponent's knowledge and information nor was this interpretation ever placed upon the transaction.

6. When the city's unlawful series of recoupments began, deponent made oral protests to its officials setting forth the difficult situation into which the Arthur C. Logan Memorial Hospital would be plunged by this course of action but officials of the Comptroller's Office and the Bureau of the Budget merely indicated that the City of New York, itself, had come upon difficult times which caused it to institute new fiscal procedures, a euphemism for the perfidious turn of policy through which these new managers of the state were seeking to balance the fiscal budget.

7. The defendants know full well the monies paid to the hospital were compensatory in nature and did not constitute, in any sense, a loan. They knew and know now it could not be contemplated that the Arthur C. Logan Memorial Hospital, operating under the severe financial constraints that it was in at that time,

which could intelligently have been projected forward, could never repay such a "loan." Now, city officials seek to show that these payments, actually made in compensation for services rendered, were not just a loan, but they seek in addition to enforce terms of repayment on this alleged transaction which have resulted in the lifting of the said 2.1 million dollars from the hospital's budget within the space of one year. This under circumstances where it was obvious that the hospital carried a continuing deficit. Under the terms and reimbursement formulas it was forced to function with by the co-defendant State of New York through Medicaid and the other ramificatory rates for its reimbursement for services.

8. The defendants well know the laws of the State of New York require a full agreement in writing for the purpose of such claimed advances to be converted at the city's convenience to the conditions of a loan, for which it intends to belatedly construct terms of repayment. Deponent is advised by his counsel, M. Douglas Haywoode, Esq., and verily believes that said laws of the State of New York also require a full evidentiary hearing be accorded any institution such as the Arthur C. Logan Memorial Hospital prior to any reduction of its Medicaid reimbursement rate for the purposes of recoupment or otherwise. The cases to this effect are voluminous and are cited in the brief submitted in support of this motion by Mr. Haywoode.

9. Deponent is advised and verily believes that the acts of the city in effecting recoupments without such a full evidentiary hearing were and are illegal and constitute wrongful conversion of federal, state and city funds due and owing said Arthur C. Logan Memorial Hospital.

10. It is a well established fact that the City of New York has engaged in prodigious feats of fiscal manipulation over the last several years in the efforts to honor its social and other commitments without raising the taxation rate of its citizens to astronomical levels. Deponent is advised that the city has continuously

and systematically overestimated revenues; underestimated expenses; placed expense charges in the capital budget; post-dated employee checks into succeeding but erroneous fiscal years; and most specifically, and germane to this case, continuously labeled "expenses" as open "advances". However justifiable and laudable the purpose of these manipulations by the City of New York may have been in its efforts to provide total services for its indigent population and other citizens, it now, by a second act of legerdemain seeks to place the burden of these years of folly squarely on the shoulders of the Arthur C. Logan Memorial Hospital and other similarly situated institutions, in an effort to correct past excesses.

11. The city's sole excuse for the withholding of the sums for which plaintiff sues herein is its attempt to effect an alleged set-off of the sums it now says were loaned. Its clear purpose can only be to effect the bankruptcy of the Arthur C. Logan Memorial Hospital. It is uncontested fact that the sum of \$104,632.00 sued for in the complaint of March, 1977 by the plaintiff is duly owed the hospital by the Department of Health, which sum now includes the second half-year's total bringing the amount to \$209,263.00. Plaintiff intends to move to amend the complaint to set forth the continuing and increasing amount of this obligation. In addition, \$255,000.00 is presently owed to the hospital under the provision of the ambulance service which was the subject of an injunction granted by this court at the heretofore agreed upon rate of \$85,000.00 per vehicle. The defendant Health and Hospitals Corporation has extended some monies on this account albeit at a claimed lesser rate, \$50,000.00 per vehicle, which it unilaterally arrived at, and even if their lowered rate were accepted close to \$200,000.00 is presently owed on this account. The defendant City of New York makes no claim to setting this amount off against the alleged 8 million dollar "loan," but still makes no payment of this and other miscellaneous sums held by the city which the hospital must have in order to function. It is uncontroverted that the amounts due for the ambulance service contract together with the ambulatory care, so-called

"ghetto medicine" contracts, \$464,264.00 is presently owed and there is no reason for the withholding of these sums from the plaintiff.

(b) As the allegation of the existence of a loan to the hospital is spurious the \$481,344.44 together with interest at 6% as allowed by the Honorable Judge Morris Lasker in his decision with regard to Medicaid reimbursements in December, 1976, is due and owing (said interest is \$19,253.77 for eight months), creating a total of \$500,598.21 owed on this account.

(c) The amount of \$620,899.83 withheld pursuant to recoupment should be reimbursed forthwith with interest as this court may allow. (Paragraph 35 of the Complaint.)

(d) The amount of \$402,234.49 constituting Medicaid submissions after October 26, 1976 should be reimbursed with such interest as the court may allow. (Paragraph 38 of the Complaint.)

(e) The amount of \$611,781.88 representing sums due for September and October is due and owing and should be submitted together with such interest as may be allowed by this court.

12. Under the constraints of the reorganization process the year to date operating loss as of May 31, 1977, has been reduced to \$8,877.00. This figure contrasts miraculously with the corresponding loss May 31, 1976 which amounted to \$387,715.00. Hospital wages have been reduced by \$555,000.00, an annualized reduction of 41.67%. Procurement of necessary supplies has been effected in such a way as to maintain the quality of care to patients with a reduction of \$475,000.00, which would be annualized at \$1,130,000.00. While the remaining seven months of the year contain many uncertainties and variables the year to date figures, if continuing the trend, show costs being reduced on the average of \$1.50 for each \$1.00 of revenue loss resulting from the economy measures implemented in 1976 pursuant to the hospital's attempt at reorganization.

Under present projections the annualized loss for 1977 would be \$240,000.00 as opposed to the usual 1.5 to 2 million dollars which have been experienced by this and other voluntary hospitals over the last several years of the inflationary cycle.

13. These dramatic reversals show clearly that the difficulties of the hospital which occasioned its move toward the protection of Chapter 11 of the Bankruptcy Laws were the product of the cash-flow restrictions and marginal operation imposed upon said hospital by the city and state defendants in their reimbursement and other payments to it.

14. So Kafkaesque is the formula under which Medicaid reimbursements are made by the defendants State of New York under the so-called State Plan and accordingly issued by the defendant City of New York, that these efficiencies and economies, far from being rewarded, would be severely penalized by reductions to take effect in 1979 under existing Medicaid reimbursement formulas. Through these traumas, the Arthur C. Logan Memorial Hospital has maintained through 1977 an average occupancy rate of 94%. It should be noted the hospital maintains a patient mix of:

- (i) 50% Medicaid patients;
- (ii) 35% Medicare patients;
- (iii) 1% No-Fault, private insurance and Workmen's Compensation patients;
- (iv) approximately 4 to 5% constituting Blue Cross health paid patients;
- (v) with a balance of 9 to 10% constituting those persons who are classified as "self-pay" (the patient population which is the subject of the Logan Hospital's claim against the state -- so-called Chapter 712 population), who have traditionally accounted for the 1.5 million dollar annual deficit.

When it is stated that the patient profile of the Logan Hospital is unique, this is demonstrated by its Medicaid population being approximately 25% in excess of the average for voluntary hospitals, and its Blue Cross patient population being almost 20% below said voluntary average. In the process, it maintains a high average of self-pay patients from that portion of the inner-city complex which is most unlikely to be able to make restitution for hospital services despite their ineligibility for Medicaid/ Medicare reimbursement and their lack of Blue Cross or other insurance guarantee.

15. Deponent verily believes that these figures demonstrate the ability of the Arthur C. Logan Memorial Hospital to successfully complete its reorganization under Chapter 11 of the Bankruptcy Act and to successfully continue to service the community in which it has functioned for 115 years if the procrustean regulatory measures of the State as to the vital Medicaid reimbursement rates (which predetermine and govern the rates at which Blue Cross and other reimbursement monies would be paid), and the city's devastating raids on funds owed the hospital coming through its hands as a trustee and paymaster, could be abated. It is significant to note that the city never filed a proof of claim in the Bankruptcy Court, and resisted in every way the jurisdiction of that Court when the hospital attempted to compel it to prove the basis of its assertion of the claimed debt. Although they seek to make much of the fact they were listed on the hospital's Schedule A as a potential debt for discharge it is obvious any debtor would list all claims, real and/or imaginary in the hope that his discharge would not leave them pending.

16. Deponent has been advised by his attorney and verily believes that even if, arguendo, the city possesses a valid claim arising from the alleged "loan" to the hospital over the last several years that claim should not be asserted in this action against the hospital as a debtor in possession but should be asserted by way of the "proof of claim" process in the Bankruptcy Court before Judge Lewittes. Deponent is advised that under the laws of this state which shall be applicable in the federal jurisdiction, the counter-claim interposed in the defendant city's answer cannot be asserted against the hospital as a debtor in possession insofar as the instant suit is brought in a different capacity and by a different entity (the debtor in possession) from the entity from which the City seeks to recover on the loan they allege to have been made.

17. At the least the defendant City of New York should be estopped from attempting to assert its present posture and the existence of the alleged "loan" by virtue of "advances" made to the hospital. As stated above, at the time of the negotiations with the old City Administration and its officials, some of whom continue in different capacities presently, the hospital was seeking

equitable relief from said officials for sums of money which were morally and otherwise justly owed to it for its services in behalf of said city and defendant State of New York. Had the city not assumed at that time the policy of covering the total operating expenses of the hospital, the institution, and most importantly, its trustees could have exercised their option to bring legal action against the responsible parties at that time or to determine to close the institution in the face of the mounting debts caused by the constraints placed by the joint sovereigns upon its operation. In accepting the monies as just compensation which the city now claims to have been a "loan" by way of "advance" the trustees have been entrapped; and seriously disadvantaged in that they now face personal imposition of federal and other tax liens and assessments with accompanying penalties, all of which they are now individually subject to due to the fiscal "sleight of hand" through which the city's budgets were previously managed, and this calculated coup of its present managerial team. In addition, had the hospital been apprised that the city contemplated a loan in the payments made to it over the years it could have included within the formula setting forth its reimbursement rates the debt service expense it would have entailed by virtue of the making of such a loan.

18. Though the city purports to be exercising its common law right of off-set it has not perfected its entitlement to any sums of the hospital by virtue of providing a full evidentiary due process hearing prior to its attempts to recoup sums which it claims are owed to it. This being so, all monies presently held pursuant to the theory of its making of an "advance" or "loan" should be released forthwith to the plaintiff as debtor in possession, and any sum claimed by the city perfected by proof of claim before the Bankruptcy Court. The city cannot maintain that this alleged debt would be entitled to any preference over other creditors.

19. It is essential to this matter to note, in addition, that 50% of the Medicaid monies withheld by the City of New York and a percentage of the other

funds are monies it holds as an agent or trustee designated by the state and the federal government, together with the voluntary hospitals themselves, as a conduit for the payment of federal funds. 25% of the monies it is withholding belong to the defendant State of New York, and only 25% of the remaining balance constitutes its own monies. It would seem questionable that the city could assert a set-off of its own funds owed the hospital under the Medicaid reimbursement formula but it becomes criminous to suggest that in its position of trust and agent paymaster it can convert the federal and/or state portions of these monies from the Arthur C. Logan Memorial Hospital's use, and the benefit of its health-care population. By pursuing its present path the city is converting federal monies to its own purpose that were clearly designated and intended by the Congress to provide for the health care of its citizens and, more importantly, citizens of the United States resident in the Central and West Harlem Community by the Arthur C. Logan Memorial Hospital. It appears the subterfuge of the "loan" or "advance" is being employed to successfully divert these funds for other city purposes. Deponent does not maintain any city official acts for personal gain in this process and as a resident of the city and state sympathizes the presumed ultimate intentions of the city managers, but the methods being employed are scandalous in their ruthless abandon, and extremely callous with regard to the rights of the trustees of the Arthur C. Logan Memorial Hospital and its patient population, poor people, and the 600, mostly marginal, employees of the hospital.

20. Unless this situation is corrected and the plaintiff is able to receive the operating funds being withheld by the defendant City of New York forthwith the fluctuations in the cash-flow received by said hospital might occasion it to succumb in bankruptcy.

21. Should the defendant City of New York prevail in its present posture it would reward its years of fiscal profligacy and device by penalizing this voluntary hospital. Its present machinations are unconscionable if any concept of

ordered liberty and regularity are to be maintained within the body politic, and the rights of the trustees of privately owned institutions are to be protected.

22. It is no secret that the City and State of New York act in accordance with a predetermined recommendation and plan of its temporary commission on finances to eliminate 5,000 beds within the City of New York on a prevailing "myth" that such a step would enhance the system for the delivery of quality health care to citizens of the country. Defendant Donald Kummerfeld has stated his clear intention to protect the 17 hospital municipal system in the implementation of this process. The quasi-independent defendant Health and Hospitals Corporation (whose separability from the city is placed in extreme question by recent lawsuits) that said defendant City of New York exercises total control over the corporation) has publicly gone on record through the statements of its new acting president, Mr. Joseph Lynaugh, as saying the total 5,000 bed complement should be reduced from the voluntary private institutions within the city and not from within the municipal system.

23. The defendants Mayor of the City and Governor of the State of New York, respectively Abraham D. Beame and Hugh L. Carey, have publicly stated their intention to appoint a "Hospital Czar" who would have summary power to close medical facilities. No where do they concern themselves with the obvious violation of due process that would result if, in the face of their previous and continuing conduct the license and property of voluntary hospitals is unjustly confiscated in furtherance of the design to salvage municipal hospitals. (It is interesting to note that a report submitted to the same commission recommended the municipal hospitals be sold to local community and other groups by the city due to current unprofitability.)

24. The present projections and direction of the hospital closings desired by the defendants seems to be emphasizing the institutions situated on the West Side of the city (predominately those hospitals catering to the indigent) the most populated areas of the city, and avoiding the concentration of medical treatment complexes on the more affluent East Side, acronymically known within the profession as "bed pan alley."

25. To the extent the defendants City and State of New York for their own diverse and sometimes congruent purposes might wish to eliminate by sundry acts and natural occurrence foreseeable from and related to inadequate rates of reimbursement to voluntary hospitals the possibility for these institutions to survive, and if they clearly intend the indiscriminate decimating of 5,000 beds within the city, they would clearly violate the requirements of the National Health Planning and Resources Development Act of 1974 and related legislation and enter upon, in devastating fashion, with intent to destroy the smaller voluntary institutions within the city for its own proprietary gain, a preserve pre-empted by the federal government by virtue of the passing by the Congress of the aforesaid health act, as I am advised by counsel.

26. The foregoing facts are known by me to be true of my own knowledge. I am competent to testify to such facts and would so testify had I appeared in court upon the trial of these matters, and verily believe on advice of my attorney, M. Douglas Haywoode, Esq., that the defendant City of New York possesses no defense as a matter of fact or law to the granting of summary judgment with regard to the aspects of the complaint designated herein as the subject of this motion for summary judgment.

27. It is respectfully submitted that all sums due and owing by the city as an uncontroverted fact should be released forthwith to the hospital with such interest as the court may deem proper and that the remaining issues proceed to trial as previously determined by this honorable court on September 12, 1976.

William O. Allen

Subscribed and Sworn to
before me on July 29th 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff,

-against-

AFFIDAVIT

77 Civ. 1216 (RO)

PHILIP L. TOIA, as Commissioner of Social
Services of the State of New York, ROBERT
P. WHALEN, as Commissioner of Health of
the State of New York, HUGH L. CAREY, as
Governor of the State of New York, JOSEPH
A. CALIFANO, Secretary of the U.S.
Department of Health, Education and
Welfare, ABRAHAM D. BEAME, as Mayor of the
City of New York, HARRISON J. GOLDIN,
Comptroller of the City of New York, and
DONAL KUMMERFELD, as Director of the Budget
of the City of New York, and as pro tem
Administrator of the Health and Hospitals
Corporation,

Defendants.

-----X
STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

GEORGE E. PUGH, being duly sworn, deposes and says:

1. That he is the Assistant Director for Financial Affairs
of the Arthur C. Logan Memorial Hospital, plaintiff in the above
entitled action. He makes this affidavit in support of the
plaintiff's motion for summary judgment against defendant State of
New York for monies due plaintiff as a result of said defendant's
requirement that this hospital treat all patients without regard
to their ability to pay by Chapter 712 of the Laws of the State
of New York, since 1972.

2. By virtue of this requirement which was imposed
upon the voluntary hospitals under pain of loss of license, the
Arthur C. Logan Memorial Hospital was obliged to treat an
inordinately high percentage of such persons, resulting in a
dollar loss of 7,355,019 to the hospital since 1972.

3. That collection efforts routinely undertaken by the hospital against this population have resulted in an average recoupment of 7.5%. By reason of the foregoing, the State of New York is indebted to the hospital for the confiscation of its services in this regard in the amount of \$6,803,393 as set forth in the following schedule:

TOTAL SELF-PAY UNCOLLECTIBLES, 1972-1976

<u>Year</u>	<u>Inpatient Department</u>	<u>Outpatient Department</u>	<u>Emergency Room</u>
1972	\$2,338,934	\$ 144,059	\$ 159,612
1973	293,238	114,880	194,366
1974	316,460	344,773	393,492
1975	401,483	577,898	532,294
1976	763,990	338,844	440,696
Totals:	\$4,114,105	\$1,520,454	\$1,720,460
	GRAND TOTAL		\$7,355,019
	Less Average 7.5% Collection		551,626
	NET TOTAL UNCOLLECTIBLE SELF-PAY		\$6,803,393

WHEREFORE, deponents asks the granting of summary judgment against the defendant State of New York in the aforesaid amount, together with costs and interest.

George E. Pugh
George E. Pugh

Subscribed and sworn to before

me on July 27, 1977.

Vincent Guarino

VINCENT GUARINO
Notary Public, State of New York
No. 31-6618646
Qualified in New York County
Term Expires March 30, 1978
Sworn and subscribed before me
This 29th day of July 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Malcolm Major, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 131-71 231 st
Laurelton N.Y. 11413

That on the 26 day of AUGUST, 1977,
deponent personally served the within BRIEF OF PLAINTIFF APPELLEE
ARTHUR C. LOGAN MEMORIAL HOSPITAL
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

W. BERNARD RICHLAND
CORPORATION COUNSEL
MUNICIPAL BUILDING
NEW YORK, N.Y. ATTN: MILTON WEINBERG

HON. LOUIS J. LEFKOWITZ
ATTORNEY GENERAL- STATE OF NEW YORK
TWO WORLD TRADE CENTER
NEW YORK, N.Y. ATTN: DAVID BIRCH

ATTORNEYS FOR DEFENDANTS-APPELLANTS

Sworn to before me this

26th day of August, 1977

Michael DeSantis
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 02-0930908
Qualified in Queens County
Commission Expires March 30, 1979